IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Donald S. Owens

SHARON BARNES and TIM BARNES,
Plaintiffs-Appellees,

v

Supreme Court No. 123661

DR. IVANA VETTRAINO, DR. WILLIAM BLESSED, PROVIDENCE HOSPITAL, AND MICHAEL ROTH, M.D.,
Defendants-Appellants,

and

JANE DOE,
Defendant.

REPLY BRIEF OF APPELLANTS IVANA VETTRAINO, M.D., WILLIAM BLESSED, M.D. AND PROVIDENCE HOSPITAL

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I. The statement of facts in plaintiffs' brief should be stricken as plaintiffs fail to include any citation to the record for the factual statements made therein.

Defendants submit that plaintiffs' statement of fact should be stricken as that statement is devoid of any citation to the record. There is not one record citation in plaintiffs' appeal brief. MCR 7.306(A) addresses and provides the formats for briefs in calendar cases. That court rule requires that briefs in calendar cases comply with the requirements of MCR 7.212(B), except that references to the record are to be made to the appendix:

> (A) **Form of Briefs.** Briefs in calendar cases must be prepared in the form provided in MCR 7.212(B), (C) and (D) and produced as provided in MCR 7.309. For purposes of this rule, references in MCR 7.212(C) and (D) to the "record" should be read as referring to the appendix.

The appellee's brief is controlled by MCR 7.212(D)(3)(b) which requires that the appellee's statement of fact contain specific page references to the record:

> A counter-statement of facts, pointing out the inaccuracies and deficiencies in the appellant's statement of facts without repeating that statement and with specific page references to the transcript, the pleadings, or other document or paper filed with the trial court, to support the appellee's assertions. [Emphasis added.]

Assertions of facts in a brief that are not supported by references to the record represented an improper attempt to enlarge the record on appeal. In re Marx's Estate, 201 Mich 504, 507; 167 NW 976 (1918), this Court stated:

> It ought not to be necessary for us to say that cases must be disposed of on the record as made, and failure of proof on a given subject may not be supplied by the unsupported statements of counsel. It is one of the functions of counsel to draw legitimate inferences from the facts proven; but it is not one of the functions of counsel to enlarge the record by voluntary and unsupported statements of fact in the brief, statements setting up facts which have been testified to by no witnesses, nor properly inferable from those established.

The statement of facts in plaintiffs' appeal brief consist of approximately nine pages. However in that nine pages, plaintiffs do not contain one citation to the record. Such is in direct violation of MCR 7.306(A) and MCR 7.212(D)(3)(b). The parties agreed by stipulation to file a

joint appendix, which these defendants prepared and filed on September 7, 2004. Plaintiffs, thus, had access to the joint appendix well in advance of the due date of their appeal brief. The only explanation as to why plaintiffs have chosen not to cite to the appendix is the simple fact that the factual assertions in plaintiffs' brief are not support by evidence which was before the trial court at the time the summary disposition motion was heard and decided by that court.[1]

Regardless, the factual assertions in plaintiffs' statement of facts are irrelevant to the legal issues before this Court. Defendants moved for dismissal before the trial court under MCR 2.116(C)(8), failure to state a claim. The legal sufficiency of the claim was thus at issue and such is tested on the pleadings alone. See Maiden v Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). Defendants hereby submit that the statement of facts in plaintiffs' brief on appeal should be stricken.

II. This cause of action which seeks damages occurring as a result of an illegal abortion in Michigan should be precluded.

The only difference between this case and the case of Taylor v Kurapati, 236 Mich App 315; 600 NW2d 670 (1999) is that here plaintiffs seek damages caused as a result of having a late term abortion.[2] The duty alleged is the same as the duty alleged in Taylor: a duty to provide information regarding the genetic make up or anatomical deformities of the unborn infant so that the parents could decide whether to carry the child to term or whether to terminate the pregnancy. In Taylor,

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[1] Before the Court of Appeals, plaintiffs' brief also attempted to enlarge the record on appeal. A defect letter was sent by that court to plaintiffs to which plaintiffs improperly responded with an amended statement of facts which cited to deposition testimony taken after the entry of the order denying summary disposition. This testimony was not presented to the trial court and thus was improperly submitted to the Court of Appeals.

[2] In their brief, plaintiffs, themselves, describe the abortion procedure as a "late term abortion." See plaintiffs' appeal brief, page 12, "resulting in Plaintiff having to leave this State and seek a late term, surgical termination of her pregnancy" and page 13 "necessitating the trip to Kansas for a late term abortion."

plaintiff sought damages for being denied the right to have an abortion. The causes of action in this case and in Taylor are essentially the same, except for the damages sought.

As the Taylor Court recognized, and as these defendants have submitted in their principal brief, the state of Michigan "provides for no right to an abortion and, in fact, makes a value judgment favoring childbirth." 236 Mich App at 347. Further, as the Taylor Court noted, "the public policy of Michigan, while limited by decisions of the United States Supreme Court, is to forbid elective abortions." Id. Recognizing that Michigan refuses to publicly fund abortion unless necessary to save the life of a mother, the Taylor Court rightfully stated:

> Because the state has no obligation to affirmatively aid a woman in obtaining an elective abortion by paying for it, **the state similarly has no obligation to take the affirmative step of imposing civil liability on a party for failing to provide a pregnant woman with information that would make her more likely to have an elective, and eugenic abortion**. [Id. at 348; emphasis added.]

The Taylor decision is controlling under MCR 7.215(C)(2) and 7.215(J)(1), until otherwise ordered by this Court. The Taylor majority specifically stated that it was addressing and deciding the "basic question whether, absent legislative action, such a tort [wrongful birth] has a rightful place in our jurisprudence." The decision by that court that such a tort should not be recognized in this state, absent legislative action, was a resolution and determination of that court and thus not dicta. Nonetheless, plaintiffs have never argued that the Taylor decision was incorrect, only that it is distinguishable from their claim and thus should not apply to the facts presented in this case.

Regardless, as presented in defendants' principal appeal brief, this Court should concluded that the Taylor decision was correct and hold that a cause of action for damages associated with the decision to undergo a late term abortion should not be recognized in the state of Michigan. As discussed in defendants brief on appeal, the late term abortion secured by plaintiff in Kansas would be considered illegal in the state of Michigan. Michigan law makes it a criminal act to procure a miscarriage or an abortion of a child once viability is reached. MCL 750.14 and MCL 750.15. Generally, plaintiffs argue that viability is between 21 and 24 weeks. For purposes of this appeal only, using dates advanced by plaintiffs in the complaint, the fetus was approximately 24 to 25

weeks in gestational age. Plaintiffs have acknowledged in their appeal brief that this was a "late term" abortion (see plaintiffs' brief, pp 12 & 13). Thus, the abortion secured by the plaintiffs in Kansas was illegal and not available in Michigan. Essentially, plaintiffs are seeking to recover damages for an act which is illegal in the state of Michigan. This Court has held that the judicial system will not lend aid to a plaintiff whose cause of action is founded on illegal conduct. Orzel v Scott Drug Co, 449 Mich 550; 537 NW2d 208 (1995).

Plaintiffs claim in their appeal brief that the cause of action is not based on their "own illegal conduct" but rather on the defendants' alleged failure in providing accurate test results in a timely fashion. However, the damages claimed are those arising out of securing a late-term abortion in the state of Kansas when such procedure would have been illegal in the state of Michigan. Thus, plaintiffs' cause of action is, in fact, premised on conduct which is considered illegal in Michigan. There is nothing in the case law that discusses and applies the wrongful conduct rule that requires the plaintiff to have been convicted of a criminal act, only that plaintiffs' action is based on his own illegal conduct. The damages sought are an element of the plaintiffs' cause of action.

A cause of action in tort requires proof of four elements: duty, breach of duty, proximate cause, and damages. Connelly v Paul Ruddy's Equipment Repair & Services Co, 388 Mich 146; 200 NW2d 70 (1972). In Orzel, this Court stated that "to implicate the wrongful conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." 449 Mich at 561. Here, the late-term abortion would be prohibited entirely under Michigan's penal and criminal statutes. The Orzel Court also addressed the causation requirement for application of the wrongful-conduct rule stating:

> Another important limitation under the wrongful-conduct rule involves causation. For the wrongful-conduct rule to apply, a sufficient causal nexus must exist before the plaintiff's illegal conduct and the plaintiff's asserted damages.
>
> > The maintenance of an action, under the general rule, may be refused or precluded only where the illegality or immorality with which plaintiff was chargeable has a causative connection with the particular transaction out of which the alleged cause of action asserted

> arose. . . . . An action may be maintained where the illegal or immoral act or transaction to which plaintiff is a party is merely incidentally or collaterally connected with the cause of action, and plaintiff can establish this cause of action without showing or having to rely upon such act or transaction although the act or transaction may be important to an explanatory of other facts in the case . . . .
>
> [449 Mich at 564, quoting 1A CJS Actions, §30, pp. 388-389.]

In this case, plaintiffs' cause of action can only be established with a showing of the illegal abortion ultimately secured in the state of Kansas. As further stated by the Orzel Court, quoting from Manning v Bishop of Marquette, 345 Mich 130, 136; 76 NW2d 75 (1956), quoting Meador v Hotel Grover, 193 Miss 392, 405-406; 9 So2d 782 (1942):

> [The plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. [449 Mich at 565.]

In Orzel, the plaintiff filed suit against a pharmacist for allegedly negligently supplying a controlled substance to the plaintiff's decedent, which allegedly caused the decedent's physical and psychological addiction to the drug and mental illness. While this Court was asked to articulate the scope of the pharmacist's duty in filling prescriptions for licensed physicians, the Court found that it did not need reach this issue since it concluded that the plaintiff's cause of action was barred under the wrongful conduct rule. This Court concluded that since the asserted injuries arose out of the illegal conduct on the part of the decedent, the claim was precluded.

Plaintiffs' citation to MCL 600.2912 as supportive of plaintiffs' argument that a refusal to recognize a cause of action founded and based on an abortion to be contrary to public policy is misplaced. MCL 600.2912 addresses the right to file a malpractice claim against someone who holds himself out to be a doctor when he or she is not. See Kambas v St Joseph's Mercy Hosp of Detroit, 389 Mich 249, 253 ; 205 NW2d 431 (1973). This statute further allows as a "defense" to

an action for services evidence of malpractice. Neither evidences a legislative intent to recognize a cause of action based on a late term abortion.

Here plaintiffs asked this Court to decide the scope of the duty owed by the defendants in a case where the allegation is a failure to provide information regarding the genetic make up of an unborn child which prevented plaintiffs from securing an abortion earlier, resulting in a late terms abortion. Plaintiffs allege as damages the emotion distress in securing a late term abortion procedure. However, plaintiffs' cause of action is based on conduct viewed as illegal in this state -- securing an abortion procedure during the last trimester pregnancy. Contrary to plaintiffs' claims, the wrongful conduct rule is clearly applicable in this case.

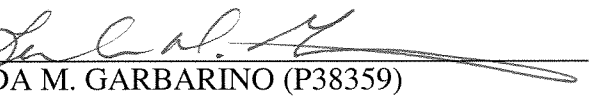
These defendants respectfully request that this Honorable Court reverse the trial court and hold that summary disposition should have been granted and that plaintiffs' cause of action should have been dismissed with prejudice.

RELIEF REQUESTED

WHEREFORE, defendants, Ivana Vettraino, M.D., William Blessed, M.D. and Providence Hospital respectfully request that this Honorable Court reverse the Court of Appeals and the trial court and hold that summary disposition should have been granted and that these defendants and this case should be dismissed with prejudice. Defendants further request costs and attorney fees.

Respectfully submitted,

TANOURY, CORBET, SHAW, NAUTS & ESSAD

By: 

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Dated: November 1, 2004

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